Supreme Court, U.S.
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80-1115

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner/Cross-Respondent

v.

NATIONAL FORGE COMPANY
Respondent/Cross-Petitioner

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is defendant entitled to summary judgment in a Section 1981 discriminatory discharge action where defendant has submitted conclusive evidence of a lawful motive for plaintiff's discharge and plaintiff's only verified opposition to the motion is a charge of discrimination filed with the Equal Employment Opportunities Commission?

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I. TABLE OF AUTHORITIES

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II. OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania on the question presented is not officially reported, and is reproduced as Appendix A to this Cross-Petition.

The opinion of the United States Court of Appeals for the Third Circuit, reversing the District Court on the question presented, is not yet officially reported, and is reproduced as Appendix B to this Cross-Petition.

III. STATEMENT OF JURISDICTION

Petitioner presents a Cross-Petition for Writ of Certiorari pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States. The original Petition for Writ of Certiorari was received by counsel for Cross-Petitioner on December 10, 1980. The judgment of the United States Court of Appeals for the Third Circuit was issued on September 10, 1980 (App. C). This Court has jurisdiction pursuant to 28 U.S. C. § 1254 (1).

IV. STATUTES AND RULES INVOLVED

Section 42 U.S.C. § 1981 provides, in pertinent part, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 56 of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> (b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred

to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

V. STATEMENT OF THE CASE

Cross-Respondent was discharged from his employment with Cross-Petitioner on March 16, 1976. The collective bargaining agreement between Cross-Respondent's union and Cross-Petitioner provided for final and binding arbitration of such a discharge. The arbitration provisions of the agreement were pursued and an arbitration award, dated August 3, 1976, sustained Cross-Respondent's discharge.

On March 16, 1978, Cross-Respondent filed the instant action through a two count complaint alleging distinct causes of action under Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185 and under 42 U.S.C. § 1981. The Section 301 count is not at issue in this Cross-Petition. Cross-Respondent's civil rights count (hereinafter "Count II") alleged that Cross-Respondent, a caucasian, was discharged in retaliation for his efforts as union president on behalf of black employees of Cross-Petitioner. On July 11, 1979, the District Court granted Cross-Petitioner's post discovery Motion for Summary Judgment, concluding that no genuine issue of material fact existed with respect to Count II.

Cross-Respondent appealed to the Court of Appeals which reversed the District Court's grant of summary judgment on September 10, 1980.

Cross-Petitioner now seeks a Writ of Certiorari to review the question raised by its Motion for Summary Judgment with respect to Count II.

VI. ARGUMENT IN SUPPORT OF THE CROSS-PETITION FOR WRIT OF CERTIORARI

1. Federal Rule of Civil Procedure 56 (c), requires that Cross-Petitioner's Motion for Summary Judgment, be granted unless a "genuine issue of material fact" exists warranting trial on the allegations of the complaint. In the instant case, the factual allegations in Count II of the complaint consisted of a solitary statement that Cross-Respondent was "terminated" in part "because of his constant fight for equal rights" and a statement that Cross-Respondent had referred other employees' complaints to the City of Erie Human Relations Commission.

Cross-Petitioner's Motion for Summary Judgment was supported by extensive documentary materials establishing beyond question that Cross-Respondent's discharge was motivated by his participation in an unlawful work stoppage at Cross-Petitioner's plant and his defiance of injunctive orders of the United States District Court issued on the authority of *Boys Markets v. Retail Clerks Union, Local 770,* 398 U.S. 235, 90 S. Ct. 1583 (1970). The materials submitted by Cross-Petitioner included such virtually unassailable factual materials as extensive references to transcribed court proceedings, Cross-Respondent's own court testimony, and orders of the District Court including the Court's specific findings that the Cross-Respondent's union - of which he was president - was in contempt of the Court and that the union's officers - including Cross-Respondent - had specifically failed to comply with the Court's injunctive orders. (*See* Opinion of the District Court, Appendix A.) The District Court was in a unique position to weigh the evidentiary value of Cross-Petitioner's submissions inasmuch as the same court had handled the injunctive proceedings which formed the exclusive factual background of Cross-Respondent's discharge from employment.

Against this overwhelming evidence, the only competent material submitted by Cross-Respondent was a copy of a Complaint he had filed with the Pittsburgh Regional Office of the Equal Employment Opportunities Commission and the customary charge affidavit. The text of this brief affidavit, which the Court of Appeals found

to be sufficient to create a genuine issue of fact, is set forth in Appendix B, opinion of the Court of Appeals.

The Court of Appeals failed altogether to deal with the rather obvious proposition that no genuine issue exists on this point unless the asserted cause for discharge is found to be a pretext - a conclusion which is inconceivable in light of the evidence.

In addition, the Court of Appeals totally disregarded the potential impact of this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, S. Ct. 1575 (1968). In *First National Bank of Arizona,* this Court clearly proscribed mere reliance upon the allegations of a complaint to defeat a properly supported Rule 56 Motion. 391 U.S. at 289, 88 S. Ct. at 1592-93. Cross-Respondent's own pleading in a collateral action is, for purposes of the proper application of Rule 56, not meaningfully distinguishable from his complaint in the instant case, upon which he could clearly not rely under *First National Bank of Arizona.*

In reversing the District Court, the Court of Appeals manifestly disregarded the laudable purpose of Rule 56; has encouraged the unnecessary trial of facts and the attendant burden upon judicial resources; and has so far departed from the proper application of the Rules of Civil Procedure that review by this Court is justified.

2. The multiplicity of administrative and judicial remedies available to an individual in the not-unusual position of Cross-Respondent cannot be ignored. In addition to the instant action in District Court, he attempted unsuccessfuly to challenge his discharge through contractual grievance procedures, the Occupational Safety and Health Review Board, the National Labor Relations Board, and the Equal Employment Opportunity Commission. All of these administrative and quasi-judicial bodies have necessarily created the prospect of claims with identical underlying facts and, often, identical or closely related questions of law as well.

In the instant case, the Court of Appeals has sanctioned reliance upon a pleading filed with one of these agencies to defeat a well-supported and otherwise unassailable Rule 56 Motion. Unques-

tionably, if this reliance were placed upon only the complaint filed *in this action,* the District Court would have been entitled to disregard the averments of the complaint. By its decision, the Court of Appeals has brought into question the propriety, under Rule 56, of a party's reliance upon a self-serving pleading filed in another forum, a consideration which, considering the potential number of such forums, has serious implications for the efficacy of Rule 56 as a device for avoiding unnecessary trials.

Indeed, Rule 56 (e) was amended by this Court in 1963 to add a specific proscription against sole reliance upon pleadings in a response to a contrary line of cases which had developed in the Third Circuit. *See, e.g., United States, ex rel, Kolton v. Halperin,* 260 F.2d 590 (3rd Cir., 1958) and the *Notes of the Advisory Committee on Civil Rules,* notes to Rule 56.

The question of the extent to which a District Court may consider the averments of administrative pleadings in determining the adequacy of a response to a properly supported Rule 56 Motion carries significant implications for the efficient administration of justice and is worthy of this Court's review.

3. The question for which review is sought is raised on Cross-Petition for a Writ of Certiorari. The application of Rule 20.5 of this Court requires that, before the instant Petition may be granted, the Court must act favorably upon Cross-Respondent's initial Petition for Writ of Certiorari.

Should the Court grant Cross-Respondent's initial Petition, the addition of the question raised by this Cross-Petition to the matters to be reviewed would impose no significant additional burden upon the Court or its resources. Granting this Cross-Petition would present the Court with an opportunity to provide guidance to the lower federal courts upon the question presented and to correct the manifest error committed by the Court of Appeals in an efficient and expeditious manner.

VII. CONCLUSION

For the reasons set forth above, the Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to correct a manifest error in its ruling on the question presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES J. LIOTTA
v.
NATIONAL FORGE COMPANY
Civil Action No. 78-25 Erie

Memorandum Opinion

KNOX, District Judge.

Plaintiff, formerly the President of Steelworkers' Local 1573, was discharged from his employment with defendant on March 16, 1976 following his participation in a work stoppage at defendant's Erie, Pennsylvania plant which began on March 3, 1976 and ended on March 11, 1976. Under the terms of the collective bargaining agreement in effect at the time, plaintiff filed a grievance which was denied by an arbitrator on August 3, 1976. On March 16, 1978, plaintiff filed this action alleging that (1) the union breached its duty of fair representation in processing his grievance (see § 301 of the National Labor Relations Act, 29 U.S.C. § 185) and (2) although plaintiff is white, defendant discriminated against him by discharging him because of his espousal of the rights of defendant's black employees (see 42 U.S.C. § 1981). Defendant initially filed a motion for summary judgment on both counts of the complaint on August 10, 1978. Determination of this motion was postponed pending the completion of discovery. On April 2, 1979, defendant renewed its motion. Extensive briefs and supporting affidavits and exhibits were received from both parties and oral argument was heard by the court on May 22, 1979. After careful consideration of the issues presented by defendant's motion, the court has determined that the motion will be granted with respect to both counts of the complaint.

(I) Count I - 29 U.S.C. § 185

We begin with the rule that summary judgment can be granted only where there is no genuine issue as to any material fact. Further, all inferences and doubts must be resolved against the moving

party. Ely v. Hall's Motor Transit Co., 590 F.2d 62 (3rd Cir. 1978).

Ordinarily, where a collective bargaining agreement provides for the arbitration of grievances, the arbitrator's decision is final and binding on the parties and not subject to review by the courts. Humphrey v. Moore, 375 U.S. 335 (1964). In cases in which the union breaches its duty of fair representation in handling the employee's grievance, however, this finality rule is inapplicable. Vaca v. Sipes, 386 U.S. 171 (1967). The Supreme Court in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), held that a plaintiff must prove (1) "an erroneous discharge" and (2) "the Union's breach of duty [of fair representation]" which (3) "taint[s] the decision of the [arbitrator]," Id., at 572, in order to come within this exception to the finality rule. Thus, in order to prove his § 301 claim, plaintiff must establish that defendant breached the collective bargaining agreement by discharging him, that the union breached its duty of fair representation in its conduct of the arbitration, and that this breach by the union contributed to the arbitrator's erroneous decision.

(A) Propriety of Plaintiff's Discharge

The collective bargaining agreement in effect at the time of plaintiff's discharge provides:

> ARTICLE VII
>
> Section 8. . . .
>
> (c) In the event of any violation of the provisions of subparagraph (b) above [forbidding work stoppages], the Union shall make immediate, sincere and diligent effort to terminate all such improper action and any employee or employees taking part in, causing or inciting any such improper action may be subjected to disciplinary action including discharge, *which disciplinary action need not be the same for all such employees.* In the event of any arbitration arising out of Company action pursuant to this subparagraph (c), *the sole question for determination by the Arbitrator shall be whether or not the grievant did take part in,* or did cause, or did incite, whichever is charged, *the improper action.* (Emphasis added). (Exhibit A to defendant's Answer).

Under the explicit terms of this agreement, the arbitrator's role was limited "to determine only whether or not each grievant did take part in the illegal strike." Arbitrator's Decision at 9, Exhibit B to defendant's Answer. One of the bases for the arbitrator's denial of plaintiff's grievance in this case was his finding that plaintiff failed to comply with a March 8, 1976 request made by Chief Judge Weber of this court during a hearing on a motion for contempt that the officers of the Local, including plaintiff, would report to work by the 7 a.m. shift on March 9, 1976 and then clock out and travel to the court at 10 a.m., if necessary, to continue the contempt hearing. The primary dispute in this case in connection with the propriety of the discharge concerns the nature of this request and plaintiff's knowledge of it.

At the arbitration hearing, defendant's counsel, Richard Zamboldi (Zamboldi), testified as to his recollection of the agreement reached. He stated that at Judge Weber's behest, all counsel agreed that the union officers would lead the rank and file members into the plant at 11 p.m. on March 8 or at 7 a.m. on March 9, at the latest. (Tr. 298-307, defendant's summary judgment exhibit A). Affidavits of the union attorneys present on that day were submitted to the arbitrator on plaintiff's behalf. These affidavits state generally that none of these attorneys stated to anyone that plaintiff agreed to this request. (Defendant's summary judgment exhibit B).

The most persuasive evidence concerning the nature of the March 8 agreement reached in Judge Weber's chambers is contained in the transcript of an in-chambers conference held on the following day together with the testimony of plaintiff at a March 22 contempt hearing and at the arbitration hearing held on June 12, 1976. At the March 9 in-chambers conference, Judge Weber stated:

> THE COURT: . . . But we had a pretty clear statement yesterday, and one of the few things that will stick in my mind, because when it was said that they would try to get back to work tomorrow, it was asked what about the officers, if they have to come to court, and it was a clear understanding in this court's mind that they would report for work and then come down here. For their convenience the case was not

> scheduled until 10:00 a.m. . . . But I am sure that it was made clear yesterday that the union officers whose presence might be required at this hearing would report. Furthermore, this hearing was scheduled at 10:00 this morning, and only tentatively scheduled, conditioned on a return to work. . . . (Tr. 4, 5, 18, defendant's summary judgment exhibit D).

Subsequently, Judge Weber issued an order holding the union and its members in contempt of court. (Defendant's summary judgment exhibit F). The order states in pertinent part that:

> . . . despite specific telegraphic requests by the Company, the Local Union Officers and Committeemen have failed and refused to return to work, [a]nd . . . despite the urgings of this Court, the employees of Plaintiff represented by Local Union 1573 have failed and refused to return to work at 11:00 P.M., March 8, 1976 and at 7:00 A.M., March 9, 1976 . . . .

On March 22, 1976, during further contempt proceedings held before Judge Weber, plaintiff testified that he was confused about whether he was to report at 11 p.m. or 7 a.m., but he acknowledged that he understood that the agreement was that the officers would check into work and then report to court. (Tr. 23-4, defendant's summary judgment exhibit C). At his arbitration hearing held on June 12, 1976, plaintiff initially denied that he had an obligation to report for work. Later, however, after examining the March 22 transcript, plaintiff testified that such a commitment "might have been" made. (Tr. 442, defendant's summary judgment exhibit A).

Plaintiff argues that Zamboldi's testimony was improper and that it could have been rebutted by live testimony from attorneys John English, Jr., George Schroeck, and George Levin, each of whom was present at the March 8 conference and each of whom has presented an affidavit to the court denying that any agreement that plaintiff would lead a group of employees into the plant was made. (Plaintiff's summary judgment exhibits 6a-6c). Although Zamboldi's testimony may have been excludable under DR 5-102(A), the court finds, as discussed in Part II of this opinion, that its admission into evidence does not require a reversal of the arbitrator's

decision. Further, the court notes that the original affidavits of English, Schroeck and Levin were received by the arbitrator. (Defendant's summary judgment exhibit B). The supplemental affidavits submitted to the court in connection with this motion are not significantly different from the originals.

The court has thoroughly reviewed the voluminous transcripts and affidavits bearing on the March 8 conference and has concluded that the plaintiff was obligated to report to work on March 9, that he failed to do so, and that his discharge was not erroneous. The court finds significant the fact that, for the convenience of the union officers, the hearing on March 9 was not scheduled until 10 a.m., thus affording them an opportunity to punch in at work at 7 a.m. and then report to the court. Judge Weber's recollection of this scheduling arrangement is substantiated by the deposition testimony of George Levin. (Tr. 22, plaintiff's summary judgment exhibit 8e). It is highly improbable that Judge Weber would have scheduled the hearing at a time which permitted the officers first to clock in at the plant and then travel to the courthouse if there had been no agreement that they would, in fact, report to work on March 9. Although plaintiff testified that he was confused as to whether he was to report at 11 p.m. on March 8 or at 7 a.m. on March 9, the evidence supports the arbitrator's finding that he knew he was to report. His failure to report at either hour justifies his discharge under the terms of the contract.

In addition to his participation in the work stoppage, plaintiff's discharge was also based on his failure to fulfill his duties as a union officer. (Plaintiff's summary judgment exhibit 7o). Plaintiff contends that the current state of the law as interpreted by the National Labor Relations Board is that an employer may not discipline a union officer in a manner different than it disciplines any other employee because of the officer's failure to perform the duties incumbent upon him as an officer. Precision Casting Co., 233 NLRB No. 35, 96 LRRM 1540 (1977)[1]. The court, however, finds the

[1]The court wishes to advise counsel that the government does not provide loose leaf services for the court. Therefore, when a West citation is unavailable, the court requests counsel to provide copies of the significant opinions upon which they rely.

reasoning of the United States Court of Appeals for the Seventh Circuit in Indiana & Michigan Electric Co. v. N.L.R.B., 101 LRRM 2475 (1979) persuasive. The Court in that case rejected the Precision Casting view and stated that:

> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe that the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonable considered inherently destructive of important employee rights. Id., at 2478.

Thus, it was proper for defendant to discharge plaintiff, the union president, while retaining other employees who also participated in the strike.

(B) Duty of Fair Representation

Even if plaintiff's discharge was erroneous, the decision of the arbitrator is final unless plaintiff establishes a breach by the union of its duty of fair representation which caused the arbitrator to reach an incorrect decision. In order to establish the requisite breach of duty, plaintiff must prove that the union's conduct was "dishonest, in bad faith, or discriminatory." Hines, supra, at 571. Errors in judgment or negligence on the part of the union representative are insufficient.

In the instant case, four of plaintiff's objections to the manner in which the union's attorney, Frank Lucchino (Lucchino), represented him at the arbitration hearing merit attention. First, plaintiff argues that the union breached its duty of fair representation when Lucchino failed to object to Zamboldi's testimony on the ground that he violated DR 5-102(A) of the Code of Professional Responsibility when he was examined by a member of his law firm about the March 8 conference. Although Lucchino may have made an error in judgment by failing to object to this testimony, and although a proper objection may have resulted in its exclusion, this failure does not rise to the level of dishonest, bad faith, or discriminatory

conduct. Even if this testimony had been excluded, the arbitrator still would have had the transcript of Liotta's testimony at Judge Weber's March 22 hearing before him. (See defendant's summary judgment exhibit A, at 443). This exhibit contains most of the substance of Zamboldi's testimony and an admission by plaintiff that he knew he was to report to work on March 9. Therefore, even in the absence of Zamboldi's testimony, as significant as it may have been to the arbitrator's decision, the arbitrator was confronted with other, substantially similar evidence. Consequently, we cannot say that the exclusion of Zamboldi's testimony would have resulted in a different decision.

Similarly, plaintiff's objection to Lucchino's failure to call Levin, Schroeck, and English to rebut Zamboldi's testimony is insufficient to support a finding of breach of duty. Affidavits from each of these attorneys were admitted into evidence (see App. to defendant's summary judgment exhibit B), thereby precluding cross-examination of the attorneys by the company's counsel. The decision not to call these individuals was, at most, an error of judgment.

Plaintiff's third objection to the union's representation of him relates to Lucchino's failure to protest the continuation of the hearing due to the unavailability of plaintiff's physician, Dr. Jack H. Marshall. Medical reports from Dr. Marshall, however, were received into evidence. (Tr.424-5, defendant's summary judgment exhibit A). The court notes that although plaintiff testified at the hearing about both his illness and Marshall's unavailability, he at no time requested that Marshall's testimony be considered or stated that his appearance was crucial. The court concludes that the failure to seek a postponement of the hearing until Dr. Marshall could be present does not constitute a breach of duty by the union.

Finally, plaintiff contends that although his personal counsel, James Logan (Logan), was present for most of the hearing, he was not in the room when Zamboldi testified and he was at the hearing as an observer only and not as a participant. Consequently, plaintiff argues that Logan's responses to the arbitrator at the conclusion of the hearing that, "Your honor, we have absolutely no objection to the way this hearing before the Arbitrator was conducted . . . It

[Lucchino's representation of Liotta] was very good," (Tr. 449-50, defendant's summary judgment exhibit A), should not be taken literally. As discussed previously, Lucchino's failure to object to Zamboldi's testimony and his subsequent decision not to call other witnesses to rebut that testimony do not amount to a breach of duty. Therefore, Logan's absence during Zamboldi's testimony and his inability to object to it as a participant are irrelevant. Further, plaintiff's argument that Logan did not wish to offend the arbitrator by objecting to the conduct of the hearing and his contention that the arbitrator's questions to Logan concerning his evaluation of the hearing were improper are without merit. Had plaintiff's personal representative been dissatisfied with the conduct of the hearing, he was given the opportunity to register his complaint on the record. Not only did he fail to object, but he stated affirmatively that Lucchino's handling of the hearing was "very good." Such a response negates any claim of unfair representation.

Consequently, the court finds that the union's representation of plaintiff was not perfunctory or conducted in bad faith, dishonestly, or discriminatorily. Individually and collectively, any errors in judgment made by the union's attorney do not constitute a breach of the union's duty of fair representation. Therefore, plaintiff's § 301 claim against defendant must fail.

(II) Count II - 42 U.S.C. § 1981

Count II of plaintiff's complaint is brought pursuant to 42 U.S.C. § 1981 which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Although plaintiff is white, he contends that his discharge resulted, at least in part, from retaliation against him for his espousal of the rights of defendant's black employees.

It is well settled that § 1981 prohibits racial discrimination in private employment against whites as well as blacks. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). A § 1981 cause of action may also be based on allegations of retaliation against a white person for advocating the rights of blacks. See Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977); DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975); National Organization for Women v. Sperry Rand Corp., 457 F. Supp. 1338 (D. Conn. 1978); Garcia v. Rush-Presbyterian-St. Luke's Med. Ctr., 80 F.R.D. 254 (N.D.Ill. 1978); Cubas v. Rapid Am. Corp., Inc., 420 F. Supp. 663 (E.D. Pa. 1976).

Recently, the Supreme Court held that a male employee who claimed that he was discharged for supporting equal employment opportunities for females could not invoke 42 U.S.C. 1985 (3) to redress a corporate conspiracy to violate Title VII of the Civil Rights Act of 1964. Great Am. Fed. Savings & Loan Assoc. v. Novotny, 47 U.S.L.W. 4681 (U.S. June 11, 1979). The Court reasoned that § 1985 (3) is a remedial statute, and that permitting Title VII rights to be asserted through § 1985 (3) would alter Title VII's time limitations and bypass its administrative enforcement.

Novotny, however, does not preclude plaintiff's § 1981 count in this case. Unlike § 1985 (3), § 1981 is a substantive statute. Further, the Supreme Court has stated that, "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975). Finally, in Novotny the Court distinguished § 1981 cases from the case before it. The Court concluded that:

> This case thus differs markedly from the cases recently decided by this Court that have related the substantive provisions of last century's Civil Rights Acts to contemporary legislation conferring similar substantive rights. In those cases we have held that substantive rights conferred in the 19th century were not withdrawn, *sub silentio,* by the subsequent passage of the modern statues . . . [I]n Johnson v. Railway Express Agency,

> [supra], we held that the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the [Civil Rights Act of 1866] and now codified, at 42 U.S.C. § 1981. 47 U.S.L.W. at 4684.

We have determined, of course, that the arbitrator's decision upholding plaintiff's discharge under the collective bargaining agreement was correct. Contrary to defendant's argument, however, the arbitrator's finding is not binding on this court in a civil rights action. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court held that

> . . . the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate [footnote omitted]. Id., at 59-60.

Although Alexander was a Title VII case, we see no reason to distinguish its holding in this case.

In dual-motivation employment discrimination cases, the Supreme Court has held that the plaintiff has the initial burden of showing that his conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the defendant's decision to discharge him. The burden then shifts to the defendant to establish that it would have discharged the employee "even in the absence of the protected conduct." Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 287 (1977). This "but for" test has been applied in § 1981 cases. East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977).

Although under Alexander the arbitral decision is no bar to plaintiff's claim, plaintiff has failed to meet his burden of establishing that racial discrimination was a substantial factor in the defendant's

decision to discharge him under Mt. Healthy. The only evidence which plaintiff has submitted to the court in support of his allegations is a letter from Bobby Kaigler, Compliance Officer of the Erie Human Relations Commission (EHRC), which states that plaintiff testified before the EHRC on behalf of black complainants who were discharged by defendant and that "It is the belief of this office that Mr. James Liotta was terminated from his job because of his constant fight for 'Equal Rights' of all men." (Plaintiff's summary judgment exhibit 7n). This letter is not an affidavit and it has not been notarized. Consequently, the conclusory "belief" expressed in the letter, which is not based on personal knowledge, is insufficient to create or support an inference that racial discrimination played any part in plaintiff's discharge. Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141 (3rd Cir.1972). No genuine issue of material fact supporting plaintiff's § 1981 claim has been presented by plaintiff's evidence. Therefore, defendant's motion for summary judgment will be granted on Count II.

An appropriate order will be entered.

/s/ William Knox
U.S. District Judge

Dated: July 11, 1979

CC:

Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JAMES J. LIOTTA
v.
NATIONAL FORGE COMPANY

Civil Action No. 78-25 Erie

ORDER

AND NOW, to wit, July 11, 1979, for the reasons set forth in the accompanying memorandum opinion,

IT IS ORDERED that defendant's motion for summary judgment on Counts I and II of plaintiff's complaint be and the same hereby is granted.

IT IS FURTHER ORDERED that judgment be and the same hereby is entered in favor of the defendant and against the plaintiff.

/s/ William Knox
U.S. District Judge

CC:

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2124 and 79-2252

JAMES J. LIOTTA, an individual,
Appellant in No. 79-2124

v.

NATIONAL FORGE COMPANY,
Appellant in No. 79-2252

ON APPEAL FROM THE UNITED STATES DISTPICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civ. No. 78-0025)

Argued: July 8, 1980
Before: SEITZ, *Chief Judge,* VAN DUSEN,
and HIGGINBOTHAM, *Circuit Judges*
(Filed: September 10, 1980)

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No. 79-2252

Opinion of the Court

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The appellant, James J. Liotta, formerly President of the Local 1573 of the United Steelworkers of America. AFL-CIO (the Union), was discharged from his employment with the National Forge Company (the Company) on March 16, 1976. This followed his participation in a work stoppage at the Company's Erie, Pennsylvania plant which began on March 3, 1976 and ended on March 11, 1976. Liotta filed a grievance pursuant to the terms of the collective bargaining agreement then in effect. His grievance was denied by an arbitrator on August 3, 1976. On March 16, 1978, he filed this action alleging first that his discharge violated the collective bargaining agreement in violation of Section 301 of the National Labor Relations Act, 29 U.S.C. §185 and that the arbitrator's contrary decision resulted from the Union's breach of its duty of fair representation. Second, he claimed that the Company discharged him because of his espousal of the rights of the Company's black employees, discriminating against him in violation of 42 U.S.C. §1981. Liotta appeals from the entry of summary judgment for the Company. The Company cross appeals on the ground that Liotta's complaint is barred by the applicable statutes of limitations. We conclude that his claim under Section 301 is time barred,

that his claim under 42 U.S.C. §1981 is not time barred, and that summary judgment was inappropriate on his Section 1981 claim because of the existence of material issues of fact. We will therefore affirm in part and reverse in part.

I.

The first question we must answer is whether Liotta's Section 301[1] cause of action was untimely and therefore whether the Company's motion to dismiss should have been granted. The Company's motion was based on the ground that Liotta's claims were barred by the three-month statute of limitations of the Pennsylvania General Arbitration Act, Pa. Stat. Ann. tit. 5 §173 (Purdon 1963). The district court held that the six-year limitations period for actions upon a contract applied.

We believe the district court erred. In *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05 (1966), the Supreme Court held that "the timeliness of a §301 suit. . .is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Courts within this circuit have consistently applied the three-month limitations period to suits seeking to vacate an arbitrator's award. *Cole* v. *United Steelworkers*, 441 F.Supp. 1346, 1351 (M.D. Pa. 1977), *aff'd mem.*, 588 F.2d 819 (3d Cir. 1978); *Siskey* v. *General Teamsters, Chauffeurs*, 419 F. Supp. 48, 50 (W.D. Pa. 1976); *UMWA* v. *Jones & Laughlin Steel Corp.*, 378 F.Supp. 1206,

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[1] Section 301(a) provides, in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185.

1211-12 (W.D. Pa. 1974); *International Brotherhood* v. *Motor Freight Express,* 356 F.Supp. 724, 726 (W.D. Pa. 1973).

It is important to identify the nature of Liotta's first cause of action since the three-month statute of limitations of Pennsylvania's General Arbitration Act would apply only where one seeks to vacate an arbitrator's award. A fair reading of Liotta's complaint demonstrates that he seeks to vacate the arbitrator's decision. Paragraph 22 of his complaint alleges that he "was unfairly represented before, during and after Arbitration by the" attorney for the International Union. App., at 10. Paragraph 23 alleges that the "Arbitration itself was improper and unfair." App., at 12. Indeed, he sought to litigate before the district court the same claim he presented for arbitration, that of improper discharge.

Moreover, the fact that Liotta alleges that the arbitration award is invalid due to the Union's breach of its duty of fair representation does not change the limitations period because the suit here is against the Company and not the Union. Thus, it is clear that Liotta was dissatisfied with and simply seeks to upset the arbitrator's decision that the Company did not wrongfully discharge him.

The result we reach comports with the general federal policy favoring arbitration as a means of resolving labor disputes, *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960), and with the federal labor policy that favors the application of shorter limitations period. In *International Union, UAW* v. *Hoosier Cardinal Corp.,* 383 U.S. 696, 707 (1966), the Supreme Court stated:

> [R]elatively rapid disposition of labor disputes is a goal of federal labor law. Since state statutes of limitations governing contracts not exclusively in writing are generally shorter than those applicable to wholly written agreements, their applicability to §301 actions comports with that goal.

Courts in other jurisdictions have consistently applied the statute of limitations pertaining to appeals from arbitration awards rather than the longer statute of limitations governing actions bottomed on written contracts when such actions seek to vacate arbitration awards. *E.g. Barbarino v. Anchor Motor Freight, Inc.*, 421 F.Supp. 1003 (W.D.N.Y. 1976); *DeLorio v. United Parcel Service, Inc.*, 401 F.Supp. 408 (D.Mass. 1975); *Hill v. Aro Corp.*, 275 F.Supp. 482 (N.D. Ohio 1967); *contra, Smart v. Ellis Trucking Co.*, 580 F.2d 215 (6th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979).

We therefore conclude that Liotta's first cause of action seeking review and vacation of the arbitration award was untimely and that the Company's motion to dismiss should have been granted.

II.

The next issue we must consider concerns Liotta's claim under 42 U.S.C. §1981.[2] As a threshold matter, however, we must first address the Company's assertion that this claim is also time barred.

As with Section 301, 42 U.S.C. §1981 provides no explicit period of limitations and courts are bound to apply the most appropriate limitations period provided by state law. *Johnson v.*

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[2]Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> 42 U.S.C. §1981

Railway Express Agency, 421 U.S. 454, 462 (1975). This court in *Davis v. U.S. Steel Supply,* 581 F.2d 335 (3d Cir. 1978), held that the six-year statute of limitations for contracts under Pennsylvania law applied to a Section 1981 claim of unlawful discharge. We therefore conclude that Liotta's second cause of action under 42 U.S.C. §1981 is not barred as untimely.

With regard to the merits of Liotta's Section 1981 claim, the district court granted the Company's motion for summary judgment for the following reasons:

> The only evidence which plaintiff has submitted to the court in support of his allegations is a letter from Bobby Kaigler, Compliance Officer of the Erie Human Relations Commission (EHRC), which states that plaintiff testified before the EHRC on behalf of black complainants who were discharged by defendant and that "It is the belief of this office that Mr. James Liotta was terminated from his job because of his contant fight for 'Equal Rights' of all men." (Plaintiff's summary judgment exhibit 7n). This letter is not an affidavit and it has not been notarized. Consequently, the conclusory "belief" expressed in the letter, which is not based on personal knowledge, is insufficient to create or support an inference that racial discrimination played any part in plaintiff's discharge. Olympic Junior, Inc. v. David Crystal, Inc., 463 F. 2d 1141 (3rd Cir. 1972). No genuine issue of material fact supporting plaintiff's claim has been presented by plaintiff's evidence.

Liotta v. National Forge Company, Civ. No. 78-0025 (W.D. Pa. July 11, 1979) at 11-12, *reprinted in* App., at 45-46.

Liotta claims, however, that he also submitted to the district court the charge he filed with the Equal Employment Opportunity Commission (EEOC) listing a number of instances where he encouraged black employees to file charges against the Company. The affidavit which was attached to his EEOC charge and which was also before the court, alleged that the Company

discharged him in retaliation for his activities in support of the rights of black employees. Specifically, he averred:

> I have consistently attempted to eliminate discrimination as practiced by Respondent Employer against Black members of Local 1573 of the United Steelworkers of America. The Respondent Company systematically has violated the non-discrimination clause known as Appendix I of the collective bargaining agreement between National Forge and Local 1573. Some of the ways I opposed discrimination, included the following: I encouraged a large number of Union members to report their allegations of discrimination to the Erie Human Relations Commission; since I began duties as President of Local 1573 in October, 1975. I encouraged a number of Black workers to file charges with such Commission, and advised them of my knowledge of the best way to remedy the specific acts they were complaining of. I also fought the company on a day-to-day basis in trying to make conditions fair for all workers. I helped to take a case to arbitration on behalf of Black worker, Dennis Toliver. Shortly before my discharge, I had notified the Respondent Employer that two other grievances of Black workers (the grievances of Troy Johnson and Aaron Clanton) regarding discrimination claims, were going to be fought through the arbitration phase of the grievance procedure. I have appeared at a number of hearings of the Erie Human Relations Commission regarding the claims of discrimination by Black workers. Respondent Company has a history of unfair discharges of Black workers, and I have been active in opposing such practices.

App., at 51-52.

Our review of this document leads us to conclude that genuine issues of material fact are raised by Liotta's specific allegations. These are matters that clearly are in dispute and

they are material because if proven they could support a finding that the Company's actions against Liotta were motivated by a racial animus.

In addition, contrary to the Company's argument, it is clear that Liotta has set forth specific facts, not merely conclusory allegations of wrongdoing by the Company. Moreover, the Company has not denied that these documents were in fact before the district court as part of the record. Instead, the Company challenges the EEOC affidavit as not complying with the technical requirements of Fed. R. Civ. P. 56(e) in that it was not alleged to be based on personal knowledge. That this argument is specious is evident from a reading both of the affidavit and of Rule 56(e). First, Rule 56(e) does not require that the affiant state affirmatively that the averments are based on personal knowledge. Rather, the Rule provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

A reading of Liotta's EEOC affidavit shows that it was "made on personal knowledge," "set[s] forth . . . facts as would be admissible in evidence," and "show[s] affirmatively that [he] is competent to testify to matters stated therein."

The fact that these allegations may not be proved at trial if the jury chooses to believe the Company is irrelevant at this stage. What is relevant is that the parties have focused on specific, pertinent issues of fact and disagree strenuously about them. We therefore conclude that summary judgment was inappropriate and that the case should be remanded on the Section 1981 claim. *See Bryson v. Brand Insulations, Inc.*, No. 79-2042, slip op. at 7 (3d Cir. Apr. 30, 1980).

III.

Accordingly, we will affirm the district court's judgment as to Count I of the appellant's complaint. We will reverse the district court's grant of summary judgment on the appellant's Section 1981 claim and remand for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2124 and 79-2252

James J. Liotta, an individual,
Appellant in No. 79-2124

v.

National Forge Company,
Appellant in No. 79-2252

(D.C. Civil No. 78-0025 Erie)

On Appeal From The United States District Court
For The Western District Of Pennsylvania

Present: SEITZ, Chief Judge and VAN DUSEN
and HIGGINBOTHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pensylvania and was argued by counsel on July 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 11, 1979, be, and the same is hereby affirmed as to the district court's grant of summary judgment on Count I of the Appellant's claim under section 301 of the National labor Relations Act, 29 U.S.C. § 185; the district court's grant of summary judgment on Count II of the Appellant's claim under 42 U.S.C. § 1981 be and the same is hereby reversed, and the cause is remanded for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ Illegible

Clerk

September 10, 1980

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